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No. 95-____

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LOUIS E. WOLFSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When does a document become a "judicial record" subject to the qualified right of public access, a question on which the federal courts of appeals and state high courts are divided?

PARTIES TO THE PROCEEDINGS

All parties to the proceeding below are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Louis E. Wolfson respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-captioned case on May 10, 1995.

OPINIONS BELOW

The Second Circuit opinion is reported at 55 F.3d 58 and is reprinted in the appendix hereto ("App.") at 1a. The opinions and orders of the United States District Court for the Southern District of New York are unreported and are reprinted at App. 8a and 11a.

JURISDICTION

The Second Circuit entered judgment in this case on May 10, 1995, App. 1a, and denied Wolfson's timely petition for rehearing and suggestion for rehearing in banc

on July 21, 1995. *Id.* at 13a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

STATEMENT OF THE CASE

This case involves the efforts of Louis E. Wolfson—in his hey day a celebrated Wall Street financier—to obtain access to certain documents that were filed with the district court in the course of his 1967 criminal trial for violation of the federal securities laws. The documents have remained under seal in the federal courthouse in Foley Square, New York for more than a quarter of a century. Wolfson is seeking access to them so that the 1967 trial, a matter of national public interest at the time and of genuine historical interest today, may be fully and accurately explored in a biography that is now being written about him.

The Second Circuit categorically rejected Wolfson's request without engaging in an individualized inquiry into either the public's interest in reviewing the requested documents or the government's interest in keeping those documents under seal. Instead, the court relied on the fact that the trial judge had ruled that the documents were not required to be provided to Wolfson at the 1967 trial. The Second Circuit thus dismissed Wolfson's argument that the requested documents are judicial records subject to the qualified right of public access under the First Amendment and federal common law because the documents were filed in connection with his public criminal trial. This ruling conflicts with the decisions of other federal circuits and state high courts, and is at odds with this Court's own right-of-access precedents.

During the 1950s, Wolfson was renowned as a "giant in finance" because of his knack at acquiring financially

ailing companies, turning them around, and selling them for a profit. *See Today's Giants in Finance*, N.Y. Times, Jan. 3, 1955, at C81. Only in his forties at the time, Wolfson's rise in American finance was regarded as "meteoric." *Id.* In 1965, however, Wolfson came under investigation by the Securities and Exchange Commission ("SEC") for alleged violations of the federal securities laws as a result of the sale of his stock in a company called Continental Enterprises Inc. ("Continental"), in which Wolfson possessed a controlling ownership interest. The Continental stock was unlisted at the time of the sale; no registration statement was filed in connection with the sale.

In 1966, Wolfson was indicted in the United States District Court for the Southern District of New York for violation of Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e(a), in connection with the sale of his Continental stock. Section 5 prohibits, *inter alia*, a controlling person from knowingly selling his shares to the public without first registering them with the SEC. *Id.* Wolfson's principal defense to this charge was that he was unaware at the time of the Continental sale that the federal registration requirements applied to the sale of *unlisted* stock, such as Continental's, and that he therefore did not knowingly violate Section 5.

A three-week trial ensued in the fall of 1967. The prosecution's key witness was Wolfson's broker, John J. Morley, who testified that he had explained the registration requirements to Wolfson prior to the sale of the Continental stock. In order to attack Morley's credibility, Wolfson's attorney, Milton S. Gould, sought production under the Jencks Act, 18 U.S.C. § 3500 and *Brady* v. *Maryland*, 373 U.S. 83 (1963), of certain documents reflecting prior statements that Morley had made to the government during the course of the Continental investigation and an earlier SEC investigation. In response, the prosecution submitted to the trial court five documents

marked as Exhibits 3504-A through 3504-E (the "Morley exhibits"), consisting of documentation of interviews and testimony that Morley had given to the SEC dating back to 1950, as well as notes of the prosecutor's own interviews with Morley.

The trial judge entertained argument from the prosecution and defense on whether the Morley exhibits were required to be provided to Wolfson. At the close of that argument, the judge ruled that, with one minor exception, the documents were not required to be produced to Wolfson. At that point, the normal practice would have been simply to return the Morley exhibits to the prosecution. *See* 18 U.S.C. § 3500(c); App. 5a, 7a. But instead, the trial judge ordered the documents filed in the record of the *Continental* trial for purposes of appellate review. The pertinent docket entry reads:

> 9-15-67. Filed one sealed brown envelope marked 'Ordered sealed and Impounded by Court, Palmieri, J.' Government's Exhibits 9/11/67—3501-A-id, 3501-B-id, 9-12-67—3504-A-id, B-id, C-id, D-id, E-id * * *. (Placed in vault—Room 602). PALMIERI, J. [App. 3a.]

The cross-examination of Morley proceeded, then Wolfson himself took the stand and denied Morley's account. Thus, one of the critical issues for the jury was whether to credit Morley's or Wolfson's testimony regarding Wolfson's knowledge of the federal registration requirements at the time of the Continental sale.[1] Apparently, the jury credited Morley's account. Wolfson was convicted of violating Section 5 of the 1933 Act in connection with the sale of his Continental stock. He

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[1] In his instructions to the jury, the trial judge underscored the importance of this credibility issue: "[I]t is going to be one of the important responsibilities you will have in this case, to decide whether you believe Morley on the one hand or whether you believe * * * Wolfson on the other hand, because depending upon which of these witnesses you believe will take you a considerable way on the road to deciding the controverted issues at hand." Trial Tr. at 2556.

was later sentenced to one year's imprisonment and received a $100,000 fine. His post-trial efforts to overturn his conviction proved unsuccessful.

The *Continental* case received national press coverage from the time of Wolfson's indictment to his conviction and unsuccessful appeals. *See, e.g.*, R. Phalon, *Wolfson is Indicted in Sales of Stock*, N.Y. Times, Sept. 20, 1966, at 1; *Wolfson Found Guilty of 'Insider' Conspiracy*, L.A. Times, Sept. 30, 1967; *Louis Wolfson Convicted*, Jacksonville Journal, Sept. 30, 1967; *The Woes of Wolfson*, Time, Sept. 30, 1966, at 106; C. Mathews, *Wolfson's Jail Term Surprises Wall Street*, N.Y. Post, Nov. 29, 1967, at 88; *Conviction of Wolfson in Conspiracy Case is Affirmed on Appeal*, Wall St. J., Dec. 30, 1968, at 8. The trial in particular was the source of daily drama and courtroom theatrics,[2] and offered celebrity witnesses like Joe DiMaggio and Ed Sullivan, both of whom testified on Wolfson's behalf. *See* T. Robards, *Wolfson Gets Year and a Fine; Still Free on Bail, Plans Appeal*, N.Y. Times, Nov. 29, 1967, at 67.

In February 1994, almost 30 years after the *Continental* trial ended in his conviction, Wolfson filed a motion to unseal the Morley exhibits.[3] In support of this motion,

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[2] The closing arguments in the *Continental* trial were particularly dramatic. As one national newspaper reported: "The courtroom was packed for the last day of proceedings in the trial of Mr. Wolfson, the controversial Florida industrialist whose exploits set a pattern for many builders of corporate empires. The audience, which included several of Mr. Wolfson's family and friends, was treated to a day of shouting, table-pounding and cajoling in eloquent summaries by both sides." *U.S. Attorney Says Lack of Filing Helped Wolfson's Stock Sale*, Wall. St. J., Sept. 27, 1967, at 4.

[3] This was not the first time Wolfson had made such a request. In 1975, Wolfson filed a civil suit against Morley in the United States District Court for the Middle District of Florida, alleging that Morley had negligently failed to advise him of the SEC registration requirements. During discovery in that proceeding, Wolfson obtained an order from then-District Court Judge Gerald B. Tjoflat

Wolfson asserted a qualified right of public access to the Morley exhibits—as judicial records—under both the First Amendment and common law. At the same time, he informed the court that a biography is now being written about him, in which the *Continental* case—a seminal event in Wolfson's life and a matter of genuine public and now historical interest—will be explored in detail. The government opposed Wolfson's request without offering a single specific interest in keeping the Morley exhibits under seal.

The United States District Court for the Southern District of New York refused to recognize a presumption of public access to the Morley exhibits under either the First Amendment or common law, and summarily denied Wolfson's motion to unseal on the ground that "Wolfson * * * failed to identify any changed circumstances other than the passage of time that require reversal of the sealing orders." App. 9a. Wolfson's request for reconsideration of that ruling was denied. *Id.* at 11a. He then appealed to the Second Circuit. That court affirmed.

Wolfson's principal argument on appeal was that the filing of the Morley exhibits in the record of his public criminal trial rendered those documents judicial records subject to the qualified right of public access under both the First Amendment and common law. That qualified right, Wolfson asserted, required the District Court to engage in an individualized balancing of the public's interest in disclosing the Morley exhibits and the government's interest (if any) in keeping those documents under seal today, and to place upon the government the ultimate burden of establishing a continued need for secrecy.

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directing the Clerk of the Southern District of New York to unseal the Morley exhibits and to transmit them to the Florida court for review by the parties in the civil suit, including Wolfson. Before Judge Tjoflat's order could be carried out by the Clerk's Office in New York, however, the trial judge in the *Continental* case (Palmieri, J.) intervened and ordered that the Morley exhibits not be made available to Wolfson. *See* App. 3a.

The government asserted a variety of arguments in support of its view that the qualified right of public access to judicial records never attached to the Morley exhibits. In response to the claim that the qualified right attached to the documents because they were filed in the course of Wolfson's criminal trial, the government recognized that other courts had focused on the act of filing, but nevertheless contended that the presumption of access did not attach to the Morley exhibits because they were filed at the direction of the court. Thus, without asserting any specific interest in keeping the decades-old Morley exhibits under seal, or taking issue with Wolfson's interest in gaining access to the documents, the government urged that the Morley exhibits be kept under permanent wraps in the federal courthouse in New York.

The Second Circuit flatly "reject[ed] the right-of-access premises underlying [Wolfson's] contention." App. at 4a. In the Second Circuit's opinion, the fact that the Morley exhibits were filed in the record of the *Continental* trial was virtually ignored. Instead, the dispositive facts, for purposes of determining whether a qualified right of access attached to the Morley exhibits, were that the trial judge had examined the documents *in camera* and ruled that they were not subject to production for purposes of Wolfson's defense. According to the Second Circuit, this trial ruling prevented the presumption of access from ever attaching to the Morley exhibits. *Id.* at 6a-7a.

Wolfson filed a timely petition for rehearing and suggestion for rehearing in banc, asserting, *inter alia*, that the panel's opinion overlooked that the Morley exhibits were filed in the official court record of Wolfson's criminal trial and were not simply subjected to *in camera* review. That petition was denied on July 21, 1995. *Id.* at 13a.

REASONS FOR GRANTING THE WRIT

In *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589 (1978), this Court recognized "a general right to inspect and copy * * * judicial records and documents."

Id. at 598. The Court explicitly declined, however, "to delineate precisely the contours of the common-law," and instead assumed the applicability of that right to the materials at issue in the *Nixon* case. *Id.* at 599. Since *Nixon*, the federal and state courts have been presented with numerous requests for access to courthouse records in connection with both criminal and civil proceedings. Lacking guidance from this Court, the lower courts have issued conflicting decisions on significant questions concerning the right of public access to judicial records.

This case presents the threshold—and perhaps most important—question on which the lower courts are presently divided: when does a document become a judicial record subject to the qualified right of public access? In the Third Circuit, the presumptive right of access attaches when a document is physically filed with the court. The Second and Fourth Circuits have expressly rejected that test, and have required that the document not only be filed with the court, but also be relevant to the performance of the judicial function and useful in the adjudicative process. The First Circuit has adopted a similar test. The test in the Eighth, Ninth, and Eleventh Circuits, by contrast, looks to whether the document is filed in connection with a proceeding that itself implicates the qualified right of public access. In addition to the federal circuits, the state high courts also are split on this important question.

This clear and multi-dimensional conflict of authority has been explicitly recognized by the Second and Fourth Circuits, as well as the New Jersey Supreme Court, in the past year alone. The result of this split is that the public has a presumptive right of access to courthouse records in one circuit, even though there is no presumptive right of access to the same type of documents in other circuits. For instance, under the test used in the Third Circuit, as well as the one used in the Eighth, Ninth, and Eleventh Circuits, the public has a presumptive right of access to the Morley exhibits because they were filed in con-

nection with Wolfson's public criminal trial. Under the test applied in the First, Second, and Fourth Circuits, the Second Circuit has concluded that there is no such presumptive right of access.

Divergent results, however, are not the only product of this conflict. Under the rule followed in the First, Second, and Fourth Circuits—and applied below—courthouse records may be permanently shielded from public view even though they were filed in connection with a traditionally public proceeding, and even though there is no actual or asserted government interest in keeping the documents under seal. Particularly in the case of documents, such as those at issue here, filed in connection with criminal trials, this result cannot be reconciled with this Court's right-of-access precedents, *e.g.*, *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986), and should not be permitted. This Court should therefore grant review in this case and reverse the judgment of the Second Circuit below.

I. THE DECISION BELOW IMPLICATES A CONFLICT ON WHEN A DOCUMENT BECOMES A "JUDICIAL RECORD" SUBJECT TO THE QUALIFIED RIGHT OF PUBLIC ACCESS

In *Nixon* v. *Warner Communications, Inc.*, this Court recognized a qualified right of access to "judicial records and documents" under the common law. The Court stated:

> It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including *judicial records and documents.* In contrast to the English practice, American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper

> publisher's intention to publish information concerning the operation of government. [435 U.S. at 597-598 (citations omitted and emphasis added).]

This "general right" is part of the federal common law, *e.g.*, *Smith* v. *United States Dist. Court*, 956 F.2d 647, 649-650 (7th Cir. 1992), and has been repeatedly recognized and applied by both federal and state courts presented with requests for access to courthouse records. *See* cases cited *infra* at 10-15.[4]

But "[f]aced with the issue of whether a document may be classified as a 'judicial document,' and therefore accessible to the public, courts have applied varying standards." *United States* v. *Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995). The Third Circuit "has focused on the technical question of whether a document is physically on file with the court." *Pansy* v. *Borough of Stroudsbourg*, 23 F.3d 772, 782 (3d Cir. 1994). *See id.* at 783 n.45 ("whether the relevant document is in the court file is the critical inquiry"); *Bank of America Nat'l Trust & Sav. Ass'n* v. *Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344-345 (3d Cir. 1986) ("[o]nce a [document] is filed

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[4] Following the reasoning of *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980) (plurality opinion) and its progeny, discussed in Part II below, most circuits have also recognized a *First Amendment* right of public access to documents submitted in connection with criminal trials and other traditionally public proceedings. *See, e.g., In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *United States* v. *A.D. PG Publishing Co.*, 28 F.3d 1353, 1356 & n.2 (3d Cir. 1994); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986); *United States* v. *Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989); *In re Search Warrant*, 855 F.2d 569, 572 (8th Cir. 1988); *CBS, Inc.* v. *United States Dist. Court*, 765 F.2d 823, 825 (9th Cir. 1985). In this case, Wolfson sought access to the Morley exhibits under both the First Amendment and common law. The Second Circuit separately addressed and denied both requests. *See* App. at 6a-7a. Wolfson petitions for review of both rulings here. This Court need not reach the First Amendment question, however, if it concludes that the Morley exhibits are subject to the common law presumption of access recognized in *Nixon*.

with the district court, it becomes a judicial record, and subject to the access accorded such records"); *Enprotech Corp.* v. *Renda*, 983 F.2d 17, 21 (3d Cir. 1993) (document not filed with the court "is not a part of the judicial record subject to disclosure under the public access doctrine"); *see also* Sloviter, *Third Circuit Review*, 38 Vill. L. Rev. 1087, 1097 (1993) (reviewing the Third Circuit's "commitment to the principle of public access to filed documents"). Under that test, the Morley exhibits are judicial records subject to a presumption of access, because, as the official docket in the *Continental* case reflects, they were filed by the Clerk of the Court. *See supra* at 4.

The Second and Fourth Circuits have expressly rejected the Third Circuit's technical-filing test. *See, e.g., United States* v. *Amodeo*, 44 F.3d at 145 ("the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of access"); *In re Policy Management Sys. Corp.*, 1995 WL 541623, at *4 (4th Cir. Sept. 13, 1995) (per curiam) (unpubl. op.) ("[w]e hold that the mere filing of a document with a court does not render the document judicial [for purposes of the common law right of access]"). Thus, in this case, the Second Circuit did not hold—as the Third Circuit would have—that the filing of the Morley exhibits in the district court created a presumptive right of access to those documents, *see* App. 4a, and, far from giving weight to the fact that the Morley exhibits were filed with the court, the panel merely expressed "surprise[] that the documents remain in the possession of the court." *Id.* at 7a.

Rather than following the Third Circuit, the Second and Fourth Circuits have followed the First Circuit, and have applied a test focusing not on whether the document was filed with the court, but instead on how the document was used in the judicial process before the court. *See, e.g., Anderson* v. *Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) (the common law presumption of

public access does not extend "beyond materials on which a court relies in determining the litigants' substantive rights"); *FTC* v. *Standard Fin. Management Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (same); *United States* v. *Amodeo*, 44 F.3d at 145 ("the item filed must be relevant to the performance of the judicial function and useful in the judicial process in order for it to be designated a judicial document"); *In re Policy Management Sys. Corp.*, 1995 WL 541623, at *4 ("[w]e agree with the Second Circuit that a document becomes a judicial document when a court uses it in determining litigants' substantive rights. Therefore, we conclude that a document must play a relevant and useful role in the adjudication process in order for the common law right of public access to attach") (citation omitted); *Rushford* v. *New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988) (documents filed in connection with summary judgment motions are subject to qualified right of access "[b]ecause summary judgment adjudicates substantive rights and serves as a substitute for trial").

In the Second Circuit's determination, the Morley exhibits failed this test because, while the Second Circuit has "construed the [common law right of access] to extend to documents considered by the court in orders disposing of substantive pretrial motions," it has not extended this right to "documents submitted to a court *in camera* for the sole purpose of confirming that the refusal to disclose them to another party was proper." App. 7a. This analysis, of course, completely discounts the fact that the Morley exhibits were not simply submitted to the court for *in camera* review, but instead were subject to argument and a ruling and then filed in the record of Wolfson's criminal trial at the direction of the trial judge. *See supra* at 4. As noted above, the fact of filing would have rendered the documents judicial records subject to the presumption of access in the Third Circuit. The same result would obtain, but for a slightly different reason, in the Eighth, Ninth, and Eleventh Circuits.

In determining whether a document is a judicial record subject to the presumption of public access, the Eighth, Ninth, and Eleventh Circuits have focused on whether the document was filed in connection with a traditionally public proceeding, such as a criminal trial, which itself implicates the qualified right of public access. *See, e.g., In re Search Warrant*, 855 F.2d at 573 (qualified right of public access extends to "documents filed in connection with * * * protected proceedings"); *Oregonian Publishing Co.* v. *United States Dist. Court*, 920 F.2d 1462, 1466 (9th Cir. 1990) (recognizing qualified right of access to "plea agreements and related documents" filed in connection with criminal proceedings), *cert. denied*, 501 U.S. 1210 (1991); *CBS, Inc.* v. *United States Dist. Court*, 765 F.2d 823, 825 (9th Cir. 1985) ("[w]e begin with the presumption that the public and the press have a right of access to criminal proceedings *and documents filed therein*") (Kennedy, J.) (emphasis added); *Associated Press* v. *United States Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) ("[t]here is no reason to distinguish between [historically open] proceedings and the documents filed in regard to them"); *Wilson* v. *American Motors Corp.*, 759 F.2d 1568, 1569, 1571 (11th Cir. 1985) (per curiam) (presumption of public access applies to the "record"—including "pleadings, docket entries, orders, affidavits or depositions, duly filed"— of "open public proceeding[s]").[6] Under this test, the Morley exhibits are

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[6] Prior to *United States* v. *Amodeo, supra*, and the instant case, this had been the approach followed in the Second Circuit as well. *See, e.g., United States* v. *Suarez*, 880 F.2d 626, 630 (2d Cir. 1989) (recognizing presumptive right of access to criminal proceedings and to documents filed in connection therewith); *United States* v. *Haller*, 837 F.2d 84, 87 (2d Cir. 1988) (recognizing presumptive right of access to plea hearings and to documents filed in connection therewith); *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987), *cert. denied*, 485 U.S. 977 (1988) (recognizing presumptive right of access to pretrial hearings and to documents filed in connection therewith). For a time, the Fourth Circuit also followed this approach. *See, e.g., In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986). In its recent ruling in *In re*

judicial records subject to a presumption of access because they were filed in connection with Wolfson's public criminal trial and, indeed, were subject to argument and a ruling during the heart of that proceeding—between the direct and cross-examination of the prosecution's key witness.

The conflict of authority in the federal circuits on when a document becomes a judicial record subject to the qualified right of public access has not gone unnoticed. The Second and Fourth Circuits have both explicitly recognized this split in recent decisions. *See In re Policy Management Sys. Corp.*, 1995 WL 541623, at *4 (recognizing that the "Second Circuit applies a different standard" than the Third Circuit in determining what documents "constitute[] 'judicial documents' subject to the common law presumption of access" and "agree[ing] with the Second Circuit" approach); *United States* v. *Amodeo*, 44 F.3d at 145 (recognizing the conflict among circuits in determining "whether a document may be classified as a 'judicial document,' and therefore accessible to the public"). So has the New Jersey Supreme Court. *Hammock* v. *Hoffmann-LaRoche, Inc.*, 142 N.J. 356, 373, 662 A.2d 546, 555 (1995) ("[t]he United States Courts of Appeal for the First and Second Circuits differ * * * from the Third Circuit in their definitions of 'court documents' [subject to the presumption of public access]").

Moreover, the state high courts also are split on this important question. Several state high courts have, like the Third Circuit, focused on whether the document was filed with the court. *See, e.g., PG Publishing Co.* v. *Commonwealth*, 532 Pa. 1, 5, 614 A.2d 1106, 1107 (1992) ("[d]ocuments that are filed with district justices are judicial documents * * *"); *Mokhiber* v. *Davis*, 537

Policy Management Sys. Corp., discussed *supra*, however, the Fourth Circuit adopted a different test and is now, like the Second Circuit, internally split on the question of when a document becomes a judicial record subject to the presumption of access.

A.2d 1100, 1112 (D.C. 1988) ("the presumptive right of access to pleadings attaches at the time the documents are filed with the court"); *Newspapers of New England, Inc.* v. *Clerk-Magistrate*, 531 N.E.2d 1261, 1263 (Mass. 1988) ("[o]n filing with the court the [search-warrant] affidavit is a public document * * * under * * * the common law"), *cert. denied*, 490 U.S. 1066 (1989); *Nast* v. *Michels*, 107 Wash.2d 300, 303, 730 P.2d 54, 56 (1986) ("[t]he public has a common law right of access to court case files").

In *Hammock* v. *Hoffmann-LaRoche, Inc., supra*, the New Jersey Supreme Court rejected that approach in favor of a test similar to that recently adopted by the Second and Fourth Circuits: "the presumption [of access] attaches to all materials, documents, legal memoranda and other papers 'filed' with the court that are relevant to any material issue involved in the underlying litigation (not simply relevant to a particular motion) regardless of whether the trial court relied on them in reaching its decision on the merits." 142 N.J. at 380, 662 A.2d at 589. Other state high courts have embraced the traditional public proceeding test followed in the Eighth, Ninth, and Eleventh Circuits. *See, e.g., Utah* v. *Archuleta*, 857 P.2d 234, 238 (Utah 1993) ("[w]e see no reason to distinguish generally between access to a [presumptively open] hearing and the documents filed in relation to that hearing"); *Ex parte Consolidated Publishing Co.*, 601 So.2d 423, 433 (A!a.) ("the qualified * * * right of access to criminal proceedings applies to the court file [in such proceedings]") (citing, *inter alia*, *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986)), *cert. denied*, 113 S. Ct. 665 (1992).

II. THE DECISION BELOW WAS WRONGLY DECIDED AND CONFLICTS WITH THIS COURT'S RIGHT-OF-ACCESS PRECEDENTS

The rule advanced by Wolfson is that a document becomes a judicial record subject to the qualified right of public access once it is filed in connection with a proceeding that itself implicates the right of access, such as a criminal trial. As noted, the Second Circuit rejected that approach in its decision below, and focused instead on the fact that the Morley exhibits were determined not to be subject to production to Wolfson at the time of the *Continental* trial. This ruling conflicts not only with the decisions in other circuits and state high courts, but also with this Court's own precedents.

In a line of cases rooted in *Richmond Newspapers, Inc.* v. *Virginia, supra,* this Court has recognized a qualified right of public access to criminal proceedings under the First Amendment to the Constitution. *See El Vocero de Puerto Rico* v. *Puerto Rico*, 113 S. Ct. 2004 (1993) (per curiam); *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"); *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596 (1982); *see also Sheppard* v. *Maxwell*, 384 U.S. 333, 349-350 (1966) (discussing the tradition of openness with respect to criminal trials); *Craig* v. *Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property").

This qualified right, together with the common law right recognized in *Nixon*, stems from two cardinal features of our criminal justice system. The first is the "presumption of openness" that has existed since long before the days of Blackstone. *See, e.g., Globe Newspaper Co.*, 457 U.S. at 605; *Press-Enterprise I*, 464 U.S. at 508; *Richmond Newspapers, Inc.*, 448 U.S. at 564-569; *In re Oliver*, 333 U.S. 257, 266 (1948). The second

feature, which in part accounts for the first, is the important check that public examination of criminal proceedings places on the proper functioning of the judicial process, and the sense of legitimacy and appearance of fairness that is fostered by ensuring public access to criminal proceedings:

> [T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to the society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government. [*Globe Newspaper Co.*, 457 U.S. at 606 (footnotes omitted).]

Accord Press-Enterprise II, 478 U.S. at 8-9; *Press-Enterprise I*, 464 U.S. at 508-510; *see also Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 495 (1975) (information about the criminal justice system is "of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business"); 3 W. Blackstone, *Commentaries* *372-373 (4th ed. 1770) (discussing the important considerations underlying the historic presumption of openness in criminal trials); M. Hale, *The History of the Common Law of England* 343-345 (6th ed. 1820) (same).[6]

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[6] The criminal trial is itself an act of government that warrants public review and comment. As Justice Brennan observed in his *Richmond Newspapers'* concurrence: "the trial is more than a demonstrably just method of adjudicating disputes and protecting rights. It plays a pivotal role in the entire judicial process, and, by extension, in our form of government. Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a

These considerations are of the highest order. As this Court observed in *Richmond Newspapers*, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." 448 U.S. at 575. Thus, openness is—and for centuries has been—"an indispensable attribute of an Anglo-American trial." *Id.* at 569.

In *Richmond Newspapers* and its progeny, this Court struck down efforts to restrict public access to criminal *proceedings*, and not documents filed in connection with those proceedings. As numerous lower courts have recognized, however, the considerations underlying the *Richmond Newspapers* line of cases apply with equal force to documents filed in connection with proceedings that themselves implicate the right of access. *See, e.g., Republic of Philippines* v. *Westinghouse Elec. Corp.*, 949 F.2d 653, 659-660 (3d Cir. 1991); *Brown & Williamson Tobacco Corp.* v. *FTC*, 710 F.2d 1165, 1178-79 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *In re Krynicki*, 983 F.2d 74, 74 (7th Cir. 1992); *In re Search Warrant*, 855 F.2d at 573; *Associated Press* v. *United States*, 705 F.2d at 1145; *see also* Cohen, *Access to Pretrial Documents Under the First Amendment*, 84 Colum. L. Rev. 1813, 1827 (1984) ("[a]ccess to pretrial documents furthers the same societal needs served by open trials and * * * criminal proceedings").

As this Court recognized in *Nixon*, when made public, court documents enable society to keep a "watchful eye

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coordinate branch of *government*. While individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights. Thus, so far as the trial is the mechanism for judicial factfinding, as well as the initial forum for legal decisionmaking, it is a genuine governmental proceeding." 448 U.S. at 595-596 (footnote omitted).

on the workings of public agencies" and allow the press to report on the "operation of government." 435 U.S. at 597-598. Recognizing a presumption of access to documents filed in connection with criminal proceedings thus facilitates the public's role in serving as a check on the criminal justice system. It also promotes informed discussions about and public confidence in that system and the results meted out in individual cases. Indeed, as is true in the case of the Morley exhibits, in many instances documents filed in connection with criminal proceedings not only record court rulings but are themselves the subject of those rulings.

The only approach that fully promotes these considerations—and yet places a reasonable limit on the public's right to inspect the judicial process—is to extend a presumption of access to all documents filed in connection with proceedings that themselves implicate the qualified right of access. If the underlying proceeding is a traditionally public one, such as the criminal trial, the public should have a presumptive right to inspect the documents filed in connection with that proceeding in order fully to monitor and examine the rulings made during the course of the proceeding. Limiting contemporaneous access to documents filed with the court may be appropriate in light of circumstances warranting secrecy at the time of the proceeding. But for centuries the overriding presumption has been—and should continue to be—in favor of openness. That presumption must be given effect once the need for secrecy no longer predominates.

Focusing on whether the document at issue was filed in connection with a proceeding that itself triggers the qualified right of access not only fully promotes the considerations underlying this Court's right-of-access precedents, but also establishes an easily administered, bright-line rule for determining when a document becomes a judicial record subject to the presumption of access. When a document is filed with the court, it becomes part

of the official record of the proceedings. The "record" is, as this Court has recognized, "a written history of the proceedings from the beginning to the end of a case." *United States* v. *Taylor*, 147 U.S. 695, 698 (1893). It is no less than

> [t]he official and authentic history of the cause, consisting in entries of each successive step in the proceedings, chronicling the various acts of the parties and of the court, couched in the formal language established by usage, terminating with the judgment rendered in the cause, and intended to remain as a perpetual and unimpeachable memorial to the proceedings and judgment. [*Black's Law Dictionary* 1273 (6th ed. 1990).]

Together, the Nation's courthouse records constitute a living documentary history of our criminal justice system, and are a testament to both its great strengths and its occasional missteps.

Courthouse records have proven to be an invaluable resource for the scholars and historians who have examined and written about the Nation's famous court trials. *See, e.g.*, G. Cowan, *The People v. Clarence Darrow* (1993) (documenting the bribery trial of Clarence Darrow); M. Smith & R. Eaton, *Eugene O'Neill in Court: Documents in the Case of George Lewys v. Eugene O'Neill* (1993) (documenting the plagiarism trial of Eugene O'Neill); *The Salem Witchcraft Papers: Verbatim Transcripts of the Legal Documents of the Salem Witchcraft Outbreak of 1862* (P. Boyer & S. Nissenbaum eds., 1977); J. Kirkwood, *American Grotesque* (1970) (documenting the trial of Clay Shaw for conspiring to assassinate President John Kennedy); J. Cornell, *The Trial of Ezra Pound: A Documented Account of the Treason Case by the Defendant's Lawyer* (1966); *The World's Most Famous Court Trial* (1925) (documenting the "Scopes evolution trial"); J. Ridpath, *The Life and Trial of Guiteau the Assassin* (1882) (documenting the trial of Charles Guiteau for the assassina-

tion of President James Garfield); *The Assassination of President Lincoln and the Trial of the Conspirators* (B. Pittman ed., 1865); *cf.* W. Rehnquist, *Grand Inquests* (1992) (documenting the Senate impeachment trials of Justice Samuel Chase and President Andrew Jackson). In this case, Wolfson is seeking access to the Morley exhibits so that his biographer may review the full record of the *Continental* trial, a matter of genuine public—and now historical—interest. All of the considerations underlying this Court's right-of-access precedents militate in favor of granting that request.[7]

But the Second Circuit dismissed these considerations, and held instead that the Morley exhibits are not judicial records subject to the presumption of access because, while they were filed in connection with Wolfson's criminal trial and remain courthouse records today, the trial judge ruled that the documents were not required to be produced to Wolfson at the time of the trial. The effect of this ruling is permanently to shield from public scrutiny documents that form the basis of an important trial ruling respecting the testimony and credibility of the prosecution's key witness, and that were filed in the record of the *Continental* case at the direction of the trial judge himself. That is completely at odds with the tradition of openness in criminal proceedings.

Quite apart from Wolfson's short-lived interest in seeking review of the Morley exhibits for purposes of cross-

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[7] The preparation of the Wolfson biography itself implicates First Amendment interests. *See Branzburg* v. *Hayes*, 408 U.S. 665, 705 (1972) (recognizing First Amendment right of, *inter alia*, "novelists" and "academic researchers" to gather information); *Joseph Burstyn, Inc.* v. *Wilson*, 43 U.S. 495, 501-502 (1952) ("books * * * [are] a form of expression whose liberty is safeguarded by the First Amendment"). So does the examination of the *Continental* trial. *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 838-839 (1978) ("the operation of the judicial system itself * * * is a matter of public interest * * * [that] lies near the core of the First Amendment").

examining Morley during the *Continental* trial, the public today has a compelling interest in inspecting those documents—along with the other documents comprising the record of the *Continental* trial—so that it may examine and comment upon the judicial process resulting in Wolfson's conviction and imprisonment for violation of the federal securities laws. This is true regardless of whether the trial court's ruling was correct; the public has a compelling interest in simply knowing that this ruling was correct. As this Court recognized in *Richmond Newspapers*, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." 448 U.S. at 572.[8] In the Second Circuit, the public is, for all practical purposes, forever barred from viewing the Morley exhibits and similar documents that are filed in connection with public criminal trials. That result conflicts with this Court's precedents.

Seattle Times v. *Rhinehart*, 467 U.S. 20 (1984) is not to the contrary. That case has been cited by lower courts

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[8] It is for this reason that several lower courts have refused to narrow the presumption of access to judicial records based on whether a document filed in the record of a traditionally public proceeding is subject to a favorable court ruling or admitted into evidence. *See, e.g., Smith* v. *United States Dist. Court*, 956 F.2d at 650 (the presumption of access extends to "everything in the record, including items not admitted into evidence"); *Republic of Philippines* v. *Westinghouse Elec. Corp.*, 949 F.2d at 661 ("papers filed in connection with a motion for summary judgment are not entitled to be shielded from public access merely because the district court denied the motion rather than granted it"); *United States* v. *Smith*, 787 F.2d 111, 114 (3d Cir. 1986) (presumptive right of access attached to transcript of side bar conference at which certain information sought by the government was ruled inadmissible on relevancy grounds, because the transcript documented an "evidentiary ruling[] that *could* affect the course of the trial") (emphasis added). *But see United States* v. *Gurney*, 558 F.2d 1202, 1210 (5th Cir. 1977) ("[t]he press has no right of access to exhibits produced under subpoena and not yet admitted into evidence, hence not yet in the public domain"), *cert. denied*, 435 U.S. 968 (1978).

for the proposition that there is no presumption of access to civil discovery materials like depositions and interrogatories. As the Court recognized, however, civil discovery is ordinarily "conducted in private" and is, in short, "not [a] public component[] of a civil trial." *Id.* at 33. The Morley exhibits, in stark contrast, were subject to argument and a ruling during Wolfson's criminal trial and then filed with the court at the direction of the trial judge. In other words, the Morley exhibits—quite unlike raw civil discovery materials—were filed in connection with a traditionally public proceeding that itself implicates the qualified right of access. As a result, they are subject to the presumption of access.[9]

Of course, as this Court recognized in *Nixon*, the right of access to judicial records is not absolute. 435 U.S. at 597. Thus, the fact that the presumption of access attaches to a document once it is filed in connection with a traditionally public proceeding does not create a contemporaneous right to inspect that document. Rather, it simply triggers an individualized determination as to whether the document may be kept from the public view

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[9] Consistent with this understanding, several lower courts have recognized that *Seattle Times* does not prevent a presumption of access from attaching to discovery materials once those materials are filed in the record of a traditionally public proceeding. *See, e.g.*, *Rushford* v. *New Yorker Magazine*, 846 F.2d at 252 (civil discovery materials filed in connection with summary judgment motion are subject to presumptive right of access); *Bank of America Nat. Trust & Sav. Ass'n* v. *Hotel Rittenhouse*, 800 F.2d at 343-344 ("unlike the civil discovery materials at issue in *Seattle Times*, a motion or settlement agreement filed with the court is a public component of a civil trial" and thus subject to a presumption of access); *Mokhiber* v. *Davis*, 537 A.2d at 1111 (presumption of access applies to civil discovery motions and supporting materials submitted to the court for a decision); *cf. Banco Popular de Puerto Rico* v. *Greenblatt*, 964 F.2d 1227, 1232 (1st Cir. 1992) ("[t]his case does not involve a right of public access * * * to records and documents filed with the district court, for the discovery materials at issue here are in the [parties'] hands, *not in the Clerk's Office*") (citations omitted) (emphasis added).

and places on the government—not the public—the burden of establishing a continued need for secrecy. *See id.* at 602; *Press-Enterprise II*, 478 U.S. at 9-10. No such inquiry has been undertaken in the case of the Morley exhibits because both the District Court and the Court of Appeals erroneously dismissed Wolfson's threshold contention that the Morley exhibits are judicial records subject to the qualified right of access.

III. THIS CASE PRESENTS A RECURRING QUESTION OF OVERRIDING IMPORTANCE AS TO WHICH UNIFORMITY IS REQUIRED

The question presented in this case is of overriding importance. As discussed above, and recognized by this Court in *Richmond Newspapers*, the considerations underlying the tradition of openness in criminal proceedings are of the highest order. *See* 448 U.S. at 575. The judgment below undermines those considerations by applying an unduly narrow test for determining when documents become judicial records subject to the presumption of access.

The question is also a recurring one. Since this Court first recognized a qualified right of public access to judicial records in *Nixon* almost 20 years ago, the lower courts have been presented with numerous requests for access to court documents in connection with both criminal and civil proceedings. *See, e.g.*, cases discussed *supra* at 10-15; Cerruti, *"Dancing in the Courthouse": The First Amendment Right of Access Opens a New Round*, 29 U. Rich. L. Rev. 237, 266 (1995) (discussing the recent "explosion of case law" involving the qualified right of public access to judicial records and proceedings). In determining whether requested documents are subject to the presumption of public access, courts must first confront the question presented here. The lower courts are, as discussed, deeply divided on that question. The time is right for this Court to provide guidance in this burgeoning area of the law.

This case presents a good vehicle for resolving the split in the lower courts. The conflict is squarely implicated by the decision below, for the first question that must be addressed in resolving Wolfson's motion to unseal is whether the Morley exhibits are judicial records subject to the presumption of public access. Both the District Court and the Court of Appeals addressed that question and firmly answered it in the negative. Moreover, in this case, the threshold determination of whether the documents are subject to the presumption of access is dispositive, since the government has declined to assert any specific interest in keeping the Morley exhibits under seal today, almost thirty years after the *Continental* trial ended in Wolfson's conviction. Any individualized balancing of interests, therefore, must be struck in the public's favor.

That this case involves a request for access to documents filed in connection with a criminal trial is also significant. As this Court has made clear in the *Richmond Newspapers* line of cases, the right-of-access doctrine has its origins—and most compelling justifications—in the criminal setting. That, of course, was the setting in which the *Nixon* case arose. While the lower courts have extended the presumption of access to judicial records to documents submitted in connection with certain civil proceedings (on the theory that the same basic considerations favoring openness obtain), the Court need not address in this case the applicability of the right of access in the civil setting.

Finally, this case illustrates the importance of ensuring public access to courthouse records. Wolfson is a genuine public figure. The *Continental* trial was a public and closely watched event when it took place, and is a matter of genuine historical interest today. Wolfson is seeking to inspect documents that were filed in the record of that proceeding almost 30 years ago—but which for no articulated reason remain under seal in the federal courthouse

in New York—in order that a biography now being written about him might fully and accurately recount and examine the *Continental* trial. Under this Court's precedents, as well as the centuries-old tradition of openness in criminal proceedings, the public enjoys a presumption of access to those documents as judicial records.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment of the Second Circuit reversed.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 599—August Term, 1994

(Argued: January 10, 1995 Decided: May 10, 1995)

Docket No. 94-1158

UNITED STATES OF AMERICA,
Appellee,

—v.—

LOUIS E. WOLFSON,
Defendant-Appellant.

Before:

KEARSE, MCLAUGHLIN, and PARKER,
Circuit Judges.

KEARSE, *Circuit Judge*:

Defendant Louis E. Wolfson appeals from an order of the United States District Court for the Southern District of New York, John F. Keenan, *Judge,* denying his motion for disclosure of documents that had been sealed and retained in a court vault for purposes of appellate review during Wolfson's criminal trial in 1967. The district court ruled that Wolfson failed to show any changed circumstance sufficient to warrant the unsealing of the documents. On appeal, Wolfson argues principally that the district court erred in placing on him the burden to show such a change in circumstances, rather than requir-

ing the government to prove that the circumstances warranted continued nondisclosure. We disagree and affirm the denial of the motion.

BACKGROUND

The material facts are not in dispute. In 1967, Wolfson was tried, along with a codefendant, on a charge of violating § 5 of the Securities Act of 1933, 15 U.S.C. § 77e(a), by selling a large quantity of stock of an issuer Wolfson controlled, for which no registration statement had been filed. Wolfson's primary defense was that he had not known of the registration requirements. One of the witnesses against him was his broker, John J. Morely, who testified that he had explained the registration requirements to Wolfson.

In order to attack Morely's credibility, Wolfson sought disclosure of earlier testimony by Morely before the Securities and Exchange Commission ("SEC"), along with the notes made by SEC investigators and an Assistant United States Attorney during interviews with Morely (collectively the "Morely documents"). Wolfson contended that the testimony and notes were discoverable under both the Jencks Act, 18 U.S.C. § 3500, and *Brady v. Maryland,* 373 U.S. 83 (1963). The government provided Wolfson with a redacted copy of Morley's SEC testimony, omitting testimony that related to a separate indictment against Wolfson, and it refused to turn over the requested notes. The government marked the unproduced documents for identification and submitted them to the trial court, Edmund L. Palmieri, *Judge,* for review *in camera.*

After conducting its *in camera* review, the trial court ruled that, with the exception of one page of the SEC testimony, the government was not required to disclose any of the material Wolfson had requested. Judge Palmieri ordered that the documents be sealed by the clerk of the court for possible review by the Court of

Appeals. The pertinent docket entry begins, "Filed one sealed brown envelope marked 'Ordered sealed and Impounded by Court. Palmieri, J.' "; it lists the documents' identification numbers; and it concludes, "(Placed in vault - Room 602). PALMIERI, J."

The jury convicted Wolfson, and this Court affirmed, *see United States v. Wolfson*, 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969). Our opinion made no reference to the alleged *Brady* or Jencks Act material.

Wolfson made postconviction efforts in other fora to have the Morely documents unsealed. In 1975, he sued Morely in the United States District Court for the Middle District of Florida, alleging a failure to advise him properly as to the SEC registration requirements, and obtained an order from that court directing the clerk of the Southern Distict of New York to unseal the Morely documents and transmit them to the Florida district court for inspection by the parties to that case. Judge Palmieri, however, forestalled that production by ordering the Southern District clerk not to unseal the documents until Wolfson had shown there were no longer sufficient grounds to keep them sealed. No such showing was made. Wolfson also requested the Morely documents pursuant to the Freedom of Information Act, 5 U.S.C. § 552, but had only limited success.

In February 1994, Wolfson moved in the Southern District to unseal the documents. He stated that when the materials were sealed in 1967, there had been no suggestion that, if disclosed, they would compromise the administration of justice or disserve the public interest. He argued that because nearly 27 years had passed since the sealing, and nearly 10 had passed since the death of his codefendant, there could no longer be any legal or factual basis for keeping the documents under seal. He also argued that he and his biographer had a compelling interest in obtaining the materials so that the biographer

could write an accurate account of the circumstances of Wolfson's trial, and that the materials were exculpatory and therefore should have been disclosed at his trial.

Judge Keenan denied the motion, stating, "Wolfson has failed to identify any changed circumstances other than the passage of time that require the reversal of those sealing orders." (Memorandum Opinion and Order dated February 18, 1994, at 2.) The court concluded that the mere passage of time was not sufficient reason to unseal the documents. This appeal followed.

DISCUSSION

On appeal, Wolfson argues principally that the lodging of the Morely documents in the district court created a presumptive right of public access derived from the First Amendment or from common law, and that the burden was thus not on him to show why the documents should be unsealed but rather on the government to show why they should not. We reject the right-of-access premises underlying this contention.

The public has an " 'implicit First Amendment right' " of access to criminal trials, absent an overriding countervailing interest. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7 (1986) (quoting *Waller v. Georgia*, 467 U.S. 39, 46 (1984)); *see Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564, 580-81 (1980) (plurality opinion). This qualified right of public access attaches as well to certain pretrial proceedings, *see, e.g., Press-Enterprise Co. v. Superior Court*, 478 U.S. at 10-13, and "to written documents filed in connection with pretrial motions" even if no hearing is held on the motion, *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987), *cert. denied*, 485 U.S. 977 (1988).

The public's First Amendment right of access to criminal proceedings and to documents submitted in them, however, is not all-encompassing. Whether there is a right of access to a particular stage of the proceeding or

to a given class of documents depends on two questions: first, whether there has been a "tradition of accessibility" to that stage or those documents, *see Press-Enterprise Co. v. Superior Court*, 478 U.S. at 10; and second, whether that traditional public access "plays a particularly significant positive role in the actual functioning of the process," *id.* at 11.

Neither of these factors is present with respect to documents that were submitted to a court *in camera* as part of a discovery dispute and were held not discoverable. A defendant's *Brady* request for discovery of exculpatory materials or materials with which to impeach a government witness does not give the defendant the right to compel the disclosure of documents that are not material for those purposes; nor does it give the defendant the right to assess materiality himself. To the extent that there is a question as to the relevance or materiality of a given group of documents, the documents are normally submitted to the court for *in camera* review. Such review preserves the confidentiality of those documents that the court determines need not be disclosed to the defendant. *See generally Pennsylvania v. Ritchie*, 480 U.S. 39, 59-61 (1978); *id.* at 60 (disputed materials are properly "submitted only to the trial court for *in camera* review"). We are unaware of any traditional right of access on the part of the public to documents to which the defendant himself has been denied access.

Similarly, when a defendant has made a Jencks Act request for material that the government claims does not relate to the subject matter of the witness's testimony, the prescribed procedure for resolving the dispute is to provide the documents to the district court for *in camera* review. *See* 18 U.S.C. § 3500(c). If the court determines that the defendant is not entitled to view the material, the government need not produce it. If the defendant objects to that ruling, the text of the material "shall be preserved by the United States and, in the event the

defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling." *Id.* Here too, where the courts determine that the defendant himself is not entitled to receive the material, the public has no traditional right of access to it. *See also Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) (no traditional public right of access even to documents actually produced in civil discovery); *Gannett Co. v. DePasquale*, 443 U.S. 368, 396 (1979) (Burger, C.J., concurring) (same).

Nor would there be any "significant positive role" for the granting of public access to documents that the court has found need not be disclosed because they do not constitute *Brady* or Jencks Act material. "[T]he purpose of *in camera* inspection is to supplement the Government's assessment of materiality with the impartial view provided by the trial judge," "not to provide a general discovery device for the defense." *United States v. Leung*, 40 F.3d 577, 583 (2d Cir. 1994). We would see no salutary effect in a principle that documents properly withheld from disclosure to a party became available to the public—and thereby to the defendant himself—merely because the defendant overreached in his discovery request. Granting the public access to these undiscoverable documents would furnish it with materials that do not bear on the merits of the trial to which the public has a right of access and would, in effect, give the defendant the discovery to which the court has ruled he is not entitled.

We conclude that the public has no First Amendment right of access to documents that the court has ruled need not be produced.

Nor do we find applicable here the public's common-law right " 'to inspect and copy public records and documents, including judicial records and documents,' " *In re Newsday, Inc.*, 895 F.2d 74, 78 (2d Cir.) (quoting *Nixon v. Warner Communications, Inc.*, 435 U.S. 589,

597 (1978)), *cert. denied*, 496 U.S. 931 (1990). We have construed this right to extend to documents considered by the court in orders disposing of substantive pretrial motions. *See, e.g., Joy v. North*, 692 F.2d 880, 893-94 (2d Cir. 1982) (summary judgment), *cert. denied*, 460 U.S. 1051 (1983). We are not aware, however, of any common-law principle that documents submitted to a court *in camera* for the sole purpose of confirming that the refusal to disclose them to another party was proper, are to be deemed judicial records open to the public. The district court normally returns such documents to the party that submitted them *in camera*; indeed, since Judge Palmieri ordered the Morely documents held only to facilitate review of any *Brady* or Jencks Act claim on appeal from Wolfson's conviction, an appeal that was decided decades ago, we are surprised that the documents remain in the possession of the court. In any event, nonproduction of the documents having been approved by the court, they are not public documents.

CONCLUSION

We have considered all of Wolfson's arguments on this appeal and have found them to be without merit. There being no right of access to the documents on the part of Wolfson or the public, the order of the district court is affirmed.

APPENDIX B

[Filed Feb. 22, 1994]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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66 Cr. 720

(Part I)

UNITED STATES OF AMERICA

-against-

LOUIS E. WOLFSON and ELKIN B. GERBERT,
Defendants.

MEMORANDUM OPINION AND ORDER

JOHN F. KEENAN, United States District Judge:

Defendant Louis E. Wolfson makes a Motion for an Order Unsealing Files that were sealed by Judge Palmieri in this case in September of 1967. For the reasons that follow, that motion is denied.

BACKGROUND

On September 15, 1967 and September 29, 1967, during the course of the criminal trial in this case, Judge Palmieri sealed certain documents after holding them not to be discoverable under the Jencks Act, 18 U.S.C. § 3500, under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Wolfson, who was ultimately convicted of felonies under the federal securities laws, now seeks the "3500 material," that was sealed, including: Exhibit 3504-A, a transcript of the testimony of John J. Morley before the Securities and Exchange Commission ("SEC")

on October 18, 1965; Exhibits 3504-B and 3504-C, the notes of United States Attorney Michael Armstrong of his interviews with John J. Morley on August 12, 1966 and April 27, 1967, respectively; Exhibit 3504-D, notes of Mr. Nichols (of the SEC) of his interview with John J. Morley on October 23, 1950; and, Exhibit 3504-E, a memorandum by Mr. Carrigan (of the SEC) of his interview with John J. Morley on March 21, 1952. Wolfson states that he needs these records because his biography is being written and he wants it to be "an accurate and truthful biography."

DISCUSSION

At the outset, I note that Wolfson already has access to Exhibit 3504-A. Therefore, I will address myself only to the remaining four exhibits. I have examined those exhibits, and see no reason to overturn the orders of Judge Palmieri sealing those documents. The Court is particularly influenced by the fact that Judge Palmieri reconsidered his Orders sealing those documents on December 9, 1975, at which time he reaffirmed his sealing orders.

In addition, Wolfson has failed to identify any changed circumstances other than the passage of time that require the reversal of those sealing orders. The court is unpersuaded that time is an adequate ground on its own to justify the unsealing of these records.

In a case with facts similar to these, *Hiss v. United States Department of Justice*, 441 U.S. 69 (S.D.N.Y. 1977), Judge Owen found no authority for unsealing old records solely based on the "historical significance" of a "thirty-year old case." *Id.* at 71. This Court agrees with Judge Owen that to disclose sealed records based on age alone would create "mischievous precedent." *Id.* Therefore, this Court declines to grant Wolfson's motion.

CONCLUSION

For the foregoing reasons, Wolfson's Motion for an Order Unsealing Files previously sealed by Judge Palmieri is denied. The Court directs the Clerk not to unseal or otherwise make available to Wolfson or his counsel exhibits 3504-B, 3504-C, 3504-D, or 3504-E. The Court will reseal these documents and return them to the Clerk of the Court.

SO ORDERED.

Dated: New York, New York
February 18, 1994

/s/ John F. Keenan
JOHN F. KEENAN
United States District Judge

APPENDIX C

[Filed May 19, 1994]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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66 CR. 720 (JFK)

UNITED STATES OF AMERICA

-against-

LOUIS E. WOLFSON and ELKIN B. GERBERT,
Defendants.

MEMORANDUM OPINION AND ORDER

JOHN F. KEENAN, United States District Judge:

Defendant Louis E. Wolfson moves this Court to reconsider its Memorandum Opinion and Order dated February 18, 1994, denying Wolfson's Motion for an Order Unsealing Files that were sealed by Judge Palmieri in this case in September of 1967. Defendant Wolfson seeks reconsideration on four grounds: 1) the documents should be unsealed because of the public's right of access to Court documents, under the common law and First Amendment; 2) the documents should be unsealed because they should have been unsealed at trial due to the Government's *Brady* obligations; 3) the documents should be unsealed because the December 9, 1975 Order of Judge Palmieri refusing to unseal the documents was an abuse of discretion and should not have been relied upon by this Court; and 4) the documents should be unsealed because the Court erroneously relied on *Hiss v. United States Dep't of Justice*, 441 F. Supp. 69 (S.D.N.Y. 1977), which is not applicable in this case. For substantially the reasons set forth in the Government's memo-

randum of law in opposition to Defendant's motion, Defendant's motion is denied.

The standard for reconsideration under Local Civil Rule 3(j) is very strict, allowing reconsideration only where it is shown that the Court "overlooked" "matters or controlling decisions." Defendant has failed to show that the Court "overlooked" anything. This Court carefully considered all matters relevant to the determination of that motion.

Wolfson's first argument, that the public has a right of access, was argued to this Court in February and specifically rejected at that time. Wolfson's second argument, that the sealed documents should have been disclosed at the time of trial, was rejected by Judge Palmieri in 1967 and the argument has long since been waived. Wolfson's third argument, that this Court improperly relied on Judge Palmieri's 1975 Opinion, is not supported by any relevant legal authority and is not countenanced by this Court. Wolfson's fourth argument, that this Court improperly relied on *Hiss v. United States Dep't of Justice*, 441 F. Supp. 69 (S.D.N.Y. 1977), is meritless. Therefore, Wolfson has failed to demonstrate that this Court "overlooked" "matters or controlling decisions."

Wolfson's motion for reconsideration of this Court's February 18, 1994 Memorandum Opinion and Order is therefore denied.

SO ORDERED.

Dated: New York, New York
May 19, 1994

/s/ John F. Keenan
JOHN F. KEENAN
United States District Judge

APPENDIX D

[Filed Jul. 21, 1995]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of July one thousand nine hundred and ninety-five.

Dkt. No.: 94-1158

USA,

v *Appellee,*

LOUIS E. WOLFSON,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Louis Wolfson.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III
Clerk

By /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney